DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Review of the Commission's Cable Attribution Rules	CS Docket No. 98-82
In the Matter of Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992 Horizontal Ownership Limits	MM Docket No. 92-264

COMMENTS OF CABLEVISION SYSTEMS CORPORATION

Howard J. Symons
Christopher J. Harvie
Mintz, Levin, Cohn, Ferris
Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
202/434/7300

Its Attorneys

Dated: August 14, 1998

TABLE OF CONTENTS

Page

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Review of the Commission's Cable Attribution Rules	)	CS Docket No. 98-82
In the Matter of Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992 Horizontal Ownership Limits	)	MM Docket No. 92-264

COMMENTS OF CABLEVISION SYSTEMS CORPORATION

Cablevision Systems Corporation ("Cablevision"), by its attorneys, respectfully submits these comments in response to the Notice of Proposed Rulemaking in CS Docket No. 98-82 ("Cable Attribution Notice")[1/] and Further Notice of Proposed Rulemaking in MM Docket No. 92-264 ("Horizontal Ownership Notice").[2/]

1/ In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Review of the Commission's Cable Attribution Rules, Notice of Proposed Rulemaking, CS Docket No. 98-82, FCC 98-112 (released June 26, 1998) ("Cable Attribution Notice").

2/ In the Matter of Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992; Horizontal Ownership Limits, Memorandum Opinion

INTRODUCTION AND SUMMARY

From its inception, cable television has been a dynamic business that has continually evolved in order to exploit new technologies and provide consumers with new services. A business that began as a "community antenna" service designed to improve broadcast signal reception in rural areas moved into urban markets and began offering viewers premium movie channels and sports programming otherwise unavailable on local over-the-air television. During the 1980s, cable penetration nearly tripled to more than 60 percent of all households, and a wide array of new satellite-delivered cable programming channels were developed. Now, at the end of the 1990s, Cablevision and other cable operators are delivering Internet access and local telephony. With its offer of advanced services and local telephone competition, cable is fulfilling the promise of the Telecommunications Act of 1996 .

Given the transformation taking place in the cable business, it is unsurprising that the structure of the industry is also undergoing changes. As cable television operators now become full-fledged providers of video, telephony and Internet access, they are forging new strategies, alliances and partnerships to achieve the scale and scope necessary to furnish these new services and to remain competitive with other providers in the changing telecommunications marketplace.

As it has been in the past, Cablevision once again is at the forefront of the transformation of the cable industry. Cablevision's founder, Charles Dolan, obtained and developed cable television systems in several suburban communities, helping to spur the growth of the cable business in metropolitan markets. Dolan also recognized that cable's increased channel capacity presented opportunities to offer consumers new programming content, and developed the

---

and Order on Reconsideration and Further Notice of Proposed Rulemaking, MM Docket No. 92-264, FCC 98-138 (released June 26, 1998) ("Horizontal Ownership Notice").

industry's first premium movie service, HBO, and the first regional sports network, SportsChannel. In the 1980s, Cablevision, through its programming arm, Rainbow Media, continued to develop innovative new programming services such as American Movie Classics and Bravo, and launched the nation's first regional news service, News 12 Long Island. Cablevision also begin to equip its cable systems with advanced capabilities that facilitated the offering of new services, such as "impulse" pay-per-view movies and a broader array of both packaged and unbundled video programming choices.

Throughout the 1990s, Cablevision has continued to rebuild and upgrade its cable plant, deploying fiber optic cable and associated electronics in order to increase channel capacity and provide advanced services such as information and interactive data services, video on demand and near-video on demand, and residential and business telephony. As a result, Cablevision now has begun to enter new markets and offer new products including vastly expanded program offerings; regional channels providing original, regional sports, entertainment and information programming; and competitive high-speed data and telephony service.

A key element of Cablevision's strategy for developing new products and meeting competition is to develop regional clusters of cable systems. Cablevision has focused its efforts on providing its full range of services in the New York, Boston, and Cleveland metropolitan areas. Clustering reduces the per-unit costs of both upgrading the company's cable networks and entering new, highly competitive markets such as local telephony and Internet access. By strengthening the company's presence in defined geographic areas, clustering also facilitates the development and deployment of new, regional programming services such as MSG Metro and News 12. The sustainability of such services depends upon an in-depth knowledge of local and regional markets, interconnection and inter-network coordination between neighboring cable systems in order to ensure the reliability of the two-way and interactive features of these new services, and intensive local marketing activities – all of which are rendered far more economical by clustering.

Consistent with its strategy of developing regional clusters of systems in major metropolitan areas, and mindful of the consolidation of its wireline competitors Bell Atlantic/NYNEX/GTE and SBC/Pacific/Ameritech/SNET, Cablevision recently acquired TCI systems in the greater New York area serving over 800,000 subscribers. In exchange, TCI obtained an 8.9 percent voting interest in the company. The transaction gives Cablevision more than 2.5 million subscribers in the New York metropolitan area, enhancing the company's economies of scale and scope and enabling it to begin to compete with Bell Atlantic.

The issues considered in the Cable Attribution Notice and Horizontal Ownership Notice arise against a backdrop of these rapid and substantial changes in the cable and telecommunications businesses. Cable operators must be able to grow in order to provide subscribers with new services and technologies and meet new competitive challenges from the telephone companies and DBS providers such as General Motors' DirecTV. The instant proceedings will have significant repercussions on the ability of cable companies to become economically and competitively viable providers of the full range of wireline network services -- video, telephony and data.

The mechanical application of rules that "attributed" Cablevision's subscriber base to TCI could undermine Cablevision's efforts to compete against much larger incumbents by precluding Cablevision from additional growth in its three metropolitan clusters. Such an outcome would be particularly anomalous, given the steps taken by Cablevision to ensure that TCI's investment in Cablevision would not give TCI control over Cablevision's operations.

Indeed, the Federal Trade Commission ("FTC") reviewed the competitive effects of the transaction and found nothing in the investment to cause it concern.

A regulatory regime that renders TCI's passive investment in Cablevision to be an attributable interest could stifle or even halt altogether Cablevision's ability to grow, particularly if the Commission fails to loosen the horizontal ownership limits imposed upon cable operators. If TCI were deemed to hold an attributable interest in Cablevision and the Commission's horizontal ownership rules were unchanged, Cablevision's ability to acquire additional systems or even to enhance substantially the total penetration of its existing potential subscriber base could be thwarted if such efforts were to result in TCI exceeding the Commission's horizontal ownership limits. Under such circumstances, Cablevision's growth also could be thwarted by further TCI expansion or acquisitions in which Cablevision has absolutely no involvement. In either case, Cablevision's ability to expand its network to achieve the economies of scale necessary to complete its system upgrades, furnish new services and compete with the telephone companies and General Motors' DirecTV would be dictated by forces entirely out of its control. Such an outcome would be detrimental to both competition and consumers.

Cablevision respectfully suggests that the Commission should reform its cable attribution rules to reflect the changing structure of the cable television business in particular and the overall telecommunications industry in general. At a minimum, the Commission should increase the voting stock benchmark for measuring an attributable interest to at least ten percent in all cases, but it should also perform a qualitative assessment on the degree of influence or control conveyed by voting interests which exceed any new benchmark established in this proceeding. It should also create a passive investor exception to the attribution rules for minority shareholders that are precluded from exercising independent voting power. The Commission's cable attribution rules should move from a purely mechanical, quantitative-based regime to a framework that analyzes the totality of facts surrounding an investment in order to determine whether a particular entity has acquired a meaningful degree of control or influence. Likewise, the Commission also should adopt proposals that would increase existing limits on horizontal ownership.

Now is not the time for the Commission to establish new types of attributable interests or to devise cable attribution rules and horizontal ownership restrictions which together could have the effect of discouraging pro-competitive transactions. Rather, the Commission should reform its attribution and horizontal ownership rules so as to promote new investment and permit market forces to flourish.

I. THE COMMISSION SHOULD ENSURE THAT ITS CABLE ATTRIBUTION AND HORIZONTAL OWNERSHIP RULES DO NOT IMPEDE EFFORTS BY CABLE OPERATORS TO IMPLEMENT BUSINESS STRATEGIES THAT PROVIDE CONSUMERS WITH NEW SERVICES AND SPUR COMPETITION IN THE HIGH-SPEED DATA AND LOCAL TELEPHONY MARKETS

In the Cable Attribution Notice, the Commission seeks comment on a number of proposals, originally raised in its pending review of the broadcast attribution rules, to reform its cable attribution standards.[3/] The Commission initiated this proceeding "in light of recent developments in the cable industry, including numerous strategic alliances, partnerships, system swaps, mergers and acquisitions among cable entities . . . ."[4/] Likewise, it adopted the Horizontal Ownership Notice as part of a periodic review to address whether the cable horizontal ownership rules are reasonable under the prevailing market conditions and continue to serve the

---

3/ See generally, Cable Attribution Notice at ¶¶ 12-17.

4/ Id. at ¶ 1.

Congressional objectives for which they were adopted, including promoting "the flow of video programming," and taking account of the "market structure, ownership patterns and other relationships" of the cable industry.[5/]

Cablevision agrees that the rapidly changing dynamics within both the cable industry and the communications marketplace as a whole necessitate reconsideration of the Commission's cable attribution and horizontal ownership rules.[6/] The cable industry has undergone great changes since passage of the 1992 Cable Act, including the deployment of new technologies and infrastructure;[7/] increased competition from telephone companies, DBS, and other video programmers;[8/] and changes in market structure and access to capital.

5/ See generally, Horizontal Ownership Notice at ¶¶ 78-88.

6/ Cf. Cable Attribution Notice at ¶ 13 (soliciting comment on "whether the assumptions underlying our cable attribution rules are still valid").

7/ As Chairman Kennard recently noted, cable companies invested over six billion dollars in infrastructure improvements in 1997, and around 55% of cable homes are now passed by high-capacity 550 MHz-750 MHz plant. Remarks by Chairman William E. Kennard to the National Cable Television Association, May 5, 1998 at 2 ("Kennard NCTA Speech"). Two-way plant, allowing for on line services and telephony, already passes 20% of all cable homes. National Cable Television Association, CABLE TELEVISION INDUSTRY YEAR-END REVIEW: 1997 at 1 ("1997 CABLE REVIEW").

8/ Cablevision faces competition in the Boston area from RCN, in Connecticut from SNET (which has a statewide cable franchise), and in a number of Ohio franchises from Ameritech. In its New York City franchises, the company faces competition from SMATV providers for its multiple dwelling unit (MDU) subscribers, who represent a substantial portion of its subscriber base in those markets. RCN has also announced plans to offer competing video programming service in some New Jersey markets served by Cablevision. Cable operators' share of the national multichannel video programming distribution market fell once again last year, to 87.10% in June 1997, compared with a share of almost 95% three-and-a-half years earlier. In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Fourth Annual Report, CS Docket No. 97-141, FCC 97-423, 13 FCC Rcd 1034, 1199 (Table E-1) ("1997 Video Competition Report"). Cable faces competition from industries such as Direct Broadcast Satellite, which continues to increase its market share with subscriber growth in the double-digits, and reached 6.85% of MVPD subscribers in June 1997. Id.

At the same time, the Commission and Congress have asked the cable industry to assume a greatly expanded role, by providing a greater diversity of channel offerings, competition to local telephone incumbents, and provision of high-speed data.[9/] The industry is clearly responding to these challenges by offering consumers new choices for both Internet access[10/] and local telephony:

> [A] handful of cable-TV companies [are] now doing what many people thought impossible a few years ago: taking on the Baby Bells on their telephone turf. . . .[T]he competitive landscape is changing again, to favor a cable push into telephony, Internet access, and other services. In June, AT&T Corp. agreed to acquire TCI for $31.8 billion in cash and stock, promising to upgrade TCI's cable lines into the equivalent of a local phone network . . .Time Warner already provides [local phone services] to about 5,000 customers in Rochester, N.Y. Cablevision Systems Corp., a company based in New York, began offering residential phone service on a limited, trial basis on Long Island last fall. The service is currently available to about 6,000 homes, and so far almost 1,000 have signed up. And MediaOne Group, a cable company recently spun off from telephone company US West Inc., recently began offering phone services in Atlanta and Los Angeles and terms customers' early response encouraging.[11/]

9/ "Cable is the most logical competitor to telephone companies for residential services. Without access to capital, cable operators believe that they will not be able to spend the necessary funds to rebuild and upgrade their systems to compete with telephone companies for telephone customers, and thus, give consumers greater choices." S. Rep. No. 104-23, at 39 (1995). See also H.R. Conf. Rep No. 104-458, at 148 (1996) (stating that facilities-based competition is possible, given the large percentage of homes passed by cable, and that the initial forays by cable into local telephony hold promise for local residential competition); Kennard NCTA Speech at 5-6 (urging the cable industry to enter telephony markets, carry digital TV channels, continue to provide cable and Internet access to schools, and provide closed captioning and video description).

10/ In 1997, cable operators expanded cable modem service into 67 markets throughout the United States, passing 9.5 million cable homes with nearly 75,000 customers. 1997 CABLE REVIEW AT 2. Digital cable technologies, allowing for expanded channel capacity which can lead, in turn, to greater programming diversity and near-video-on-demand, will be available to over 10 million cable homes this year. Id. at 3.

11/ "In Southern California, Cox Communications Rattles a Baby Bell," Wall St. Journal, August 6, 1998 at A1, A8 ("Cox Rattles Baby Bell").

Cablevision has sought to keep pace with the rapidly changing technological and economic landscape of the cable and telecommunications business by upgrading its cable networks, offering new services, and developing clusters of cable systems. In the last three years, Cablevision has spent nearly $700 million rebuilding its cable systems, and it expects to spend up to $1 billion more over the next three years continuing such upgrades. Cablevision's rebuilds generally consist of increasing bandwidth capacity on its hybrid fiber coaxial networks to 750 Mhz, reducing the number of homes per node from roughly 12,000 to 500, and deploying two-way capabilities. These upgrades yield significantly expanded channel capacity, new video programming features and functions, improved service reliability and picture quality, and the ability to provide competitive telephony and Internet access services to consumers. Cablevision presently makes cable modem service available to over 200,000 subscribers in New York and Connecticut. The company also provides facilities-based telephone service through its wholly-owned subsidiary Cablevision Lightpath, Inc. ("Lightpath"). Lightpath currently offers commercial telephony services in Connecticut and Long Island,[12/] has begun its roll-out of services to residential customers in Long Island, and plans to expand service throughout its markets.[13/]

Cablevision has pursued a strategy of building metropolitan system "clusters" in order to achieve the economies of scale and scope necessary to undertake its network upgrades, roll-out new services, and remain competitive with rivals such as Bell Atlantic/NYNEX/GTE and

---

[12/] Thus far, Lightpath's commercial services have yielded $40 million in annual revenue from 1,000 customers leasing 25,000 access lines. "Dolan's message to Congress: 'This is real competition,'" Multichannel News, March 30, 1998 at 1 ("Dolan's message").

SBC/Pacific/Ameritech/SNET. The company's clusters are located in the New York, Boston, and Cleveland metropolitan areas. As the Commission has recognized, clustering can "reduce costs and improve operating and management efficiencies," position cable operators to serve as an outlet for regional advertising, and "enhance MSOs' ability to compete successfully in the future with LECs and major electric utilities as providers of data transmission and local telephone services."[14/] Cablevision's clustering strategy lowers the up-front, per-unit investment costs of its network upgrades and substantially enhances the potential returns on that investment. Clustering also reduces the risks and costs (such as marketing and installation) associated with entering highly competitive markets such as local telephony and Internet access.

Likewise, Cablevision's ability to develop and distribute new, local programming services is substantially enhanced by its clustering strategy. Through its experience with the News 12 services, Cablevision has learned that a strong local presence is critical to the success of regional programming services, in order to facilitate the development of compelling information and entertainment content with a distinctly local flavor. Moreover, the heightened costs and risks associated with the smaller potential audience base for regional programming services can be offset by distributors with a strong presence in, and commitment to, the potential local, geographic markets for such services. In addition, since Cablevision plans to make interactive and two-way capabilities a key feature of its new local, programming services (to enable, for

---

[13/] Lightpath hopes to market residential telephony services to 60,000 homes by the end of this year, and 240,000 homes by the end of 1999. See "Dolan Quashes Rumors Cablevision Might Buy N.Y. Yankees," Communications Daily, March 25, 1995 at 3-4; Dolan's message at 1.

[14/] 1997 Video Competition Report, 13 FCC Rcd at 1115 ¶140. See also "State of Competition in the Cable Television Industry: Hearing before the House Committee on the Judiciary," 105th Cong., (Sept. 24, 1997) (testimony of Reed E. Hundt) (generally supporting cable clustering as a response to major competition from the telephone industry) ("Hundt Sept. 24, 1997 Testimony").

example, viewers to manipulate camera angles or to permit live, interactive community programming), system clustering reduces the technical obstacles to providing these features to all viewers within a particular local market.

The implementation of a clustering strategy may necessitate acquisitions of, or alliances with, neighboring cable systems in particular regional markets. As described below, Cablevision recently acquired TCI's New York-area systems in one such transaction. The Commission should ensure that its cable attribution and horizontal ownership rules do not operate to impede such acquisitions and alliances, which are often necessary to provide the economies of scale and scope required to launch advanced cable services, new programming ventures, and entry into the high-speed data and local telephony markets. Narrow or inflexible attribution requirements could stifle pro-competitive transactions and ventures that promote innovation and competition with respect to an array of services.

II. THE COMMISSION'S RULES SHOULD BE STRUCTURED SO AS TO ENCOURAGE PRO-COMPETITIVE VENTURES SUCH AS THE RECENT CABLEVISION-TCI TRANSACTION

The Commission has asked commenters to provide information on the "business arrangements involved in recent cable system partnerships, joint ventures, swaps, transfers, mergers, and acquisitions . . .", including details on the structure of the transactions and what steps were taken to insulate one or more parties from exercising control or influence over the other's operations.[15/] To effectuate its clustering strategy, Cablevision entered into one such transaction, under which it acquired TCI systems that significantly enhance Cablevision's presence in the New York metropolitan area and facilitates its ability to offer new and advanced

[15/] Cable Attribution Notice at ¶16.

services and local telephony. The transaction, which was reviewed and approved by the FTC, is carefully structured to prevent TCI from wielding any control over Cablevision's operations, management and decisionmaking. Revisions to the Commission's cable attribution or horizontal ownership rules should be designed to encourage and promote pro-competitive transactions such as the Cablevision/TCI deal and ensure that companies like Cablevision can continue to grow and expand.

A. The Cablevision/TCI Transaction Will Foster Competition, Innovation and New Services for Millions of Consumers in the New York Metropolitan Area

In March 1998, Cablevision completed its acquisition of TCI cable systems in New Jersey and Westchester County, New York, that together serve over 800,000 subscribers. The transaction enables Cablevision to strengthen its cluster of systems in the New York area and gives the company approximately 2.5 million subscribers there. Concurrently, Cablevision also sold several of its A-R Cable properties located in non-strategic markets.[16/]

In January of this year, Cablevision also announced its intention to acquire TCI's Connecticut cable systems in and around Hartford, Vernon, Branford and Lakeville. This acquisition continues to advance Cablevision's clustering strategy, since the Connecticut systems

---

[16/] See, e.g., "TCIC/Cablevision swap done," Broadcasting & Cable, March 9, 1998 at 60 ("TCIC/Cablevision swap"); "Closing of Cable TV Deal Gives TCI 33% Stake in Cablevision," Telecommunications Reports, March 9, 1998 ("Cable TV Deal"). See also "TCI and Cablevision Compete Transaction; New York, New Jersey Area Cable Systems Serving 830,000 Customers Transferred to Cablevision, TCI Received Equity Position in Return," Cablevision press release dated March 4, 1998 (visited August 12, 1998) <http://www.cablevision.com/cvhome/cvabout/news/tci_acq.htm>.

acquired by TCI serve approximately 250,000 subscribers, adding to Cablevision's pre-existing subscriber count of 202,000 homes in Connecticut.[17]

By strengthening Cablevision's existing systems clusters, the TCI transactions enable Cablevision to bring significant benefits to its subscribers. The transactions permit Cablevision to establish a consolidated platform of operations that will generate savings in training, repair and construction, customer services, and region-specific marketing expenses. Cablevision can as a result more efficiently deploy new, innovative services such as video-on-demand and expanded programming lineups; cable modems and data delivery; and low-cost competition for local telephony. Moreover, the increased number of subscribers in the New York metropolitan area, for example, will make it economically viable to create and distribute regional programming services, such as news channels and "MSG Metro," a concept developed by Cablevision in which regional programming services featuring localized entertainment, educational, news and information content will be distributed within targeted geographic areas.[18]

---

[17] See, e.g., Kent Gibbons, "The 'wizards' of Woodbury? Dolans buying broke electronics chain." Multichannel News, Feb. 2, 1998 at 1; "Cablevision, TCI Lead Pack in Raft of Cable TV System Deals," Telecommunications Reports, Feb. 2, 1998 at 13.

[18] MSG Metro is a package of three new channels providing information and entertainment programming that specifically reflects the localized needs and interests of New York area residents. Representing a $100 million commitment and customized for 27 different regions of the New York DMA, MSG Metro is unique for its depth and breadth of focus. It is the nation's only local programming package designed for consecutive channel placement, creating a reliable destination for local programming on the dial. The MSG Metro channels are: MSG Metro Learning Center, a personal growth and education channel designed for students and adults; MSG Metro Guide, the tri-state area's first and only televised informational and entertainment guide, which will include local arts, cultural, and sporting events; and MSG Metro Traffic & Weather, providing 24-hour local traffic, transit, and weather information. As of its August 5 launch, MSG Metro was available to about 2.4 million subscribers in New York, New Jersey, and Connecticut. See, e.g., "Rainbow Media to Launch Nation's First Package of Regional Channels" (visited Aug. 6, 1998) <http://www.msgmetro.com/msgabout.html>.

These transactions also will give Cablevision the size, cash flow, and capital resources to attempt to compete with Bell Atlantic/NYNEX/GTE and SBC/Pacific/Ameritech/SNET in the telephony, data transmission, and video markets.[19] The newly merged Bell Atlantic/NYNEX, with its formidable economies of scale and scope, is Cablevision's key competitor in the provision of wireline network services in the greater New York area. Bell Atlantic/NYNEX's recent announcement of its intention to acquire GTE will further enlarge that company's economies of scale and scope.[20] Likewise, the SBC/Pacific/Ameritech/SNET combination represents a powerful competitor to Cablevision in Connecticut, as well as Ohio. These mergers plainly and powerfully signal that expansion, in terms of both network scope and service offerings, is necessary in order for Cablevision to continue to survive and flourish in the markets it serves.

B. The Acquisition of TCI's New York/New Jersey Cable Systems Was Structured to Preserve and Ensure Cablevision's Continued Control Over All Aspects of its Business

Even though Cablevision and TCI consummated their New York/New Jersey transaction in stock, not in cash, Cablevision took great care to prevent TCI from obtaining any control over its operations and programming decisions. In exchange for the New York/New Jersey cable

---

[19] Bell Atlantic/NYNEX and GTE had combined revenues in 1997 of $53 billion. See, e.g., Scott Moritz, "Bell Atlantic-GTE Merger Enables Packaging of Telephone Services," Knight-Ridder/Tribune Business News, July 29, 1998 ("Merger Enables Packaging"). This is over 25 times greater than Cablevision's 1997 revenues of approximately $2 billion. See CSC Holdings, Inc., Securities and Exchange Commission Form 10-K, filed March 31, 1998 at 30 ("Cablevision Form 10-K").

[20] See, e.g., "Bell Atlantic-GTE Merger Adds Fuel to Consolidating Debate," Communications Daily, July 29, 1998; Merger Enables Packaging.

systems involved in the deal, TCI received 12.2 million shares of common stock.[21/] Cablevision also agreed to assume $669 million worth of debt associated with the acquired systems.[22/] However, the acquisition of the additional New York area subscribers, coupled with the sale of some of the company's nonstrategic assets, actually helped to spur a significant drop in Cablevision's debt to cash flow ratio, from 9:1 to 6:1.[23/]

While TCI received an equity interest in Cablevision of approximately 33 percent in exchange for the New York/New Jersey systems,[24/] the transaction does not grant TCI any ability to control Cablevision. TCI holds only class A stock, each share of which has 1/10 the voting power of class B stock, all of which is held by the Dolan family.[25/] Thus, TCI's voting interest in Cablevision is only 8.9 percent.[26/] By contrast, Cablevision's chairman Charles F. Dolan retains control of over 44.7 percent of the total voting power of the Common Stock, and Dolan family

---

21/ See Cablevision Form 10-K at 1, 4-5. See also, TCIC/Cablevision swap; Cable TV Deal. Subsequent to the completion of the transaction, Cablevision effected a two-for-one stock split, making TCI's total holdings over 24.4 million shares.

22/ See Cablevision Form 10-K at 4-5.

23/ See Cablevision Systems Corporation, 1997 Annual Report 2 (1998).

24/ See Cablevision Form 10-K at 1, 4-5. As a result of the transaction for the TCI Connecticut systems, TCI's equity position in Cablevision is expected to rise from approximately 33 percent to 36 percent. See, e.g., "Cablevision systems gets 250,000 Conn. subscriber and The Wiz," Communications Daily, January 29, 1998 at 6. Cablevision also will assume $110 million in debt associated with the Connecticut systems, and provide TCI with Cablevision's cable system in Kalamazoo, Michigan. Because the transaction has not yet been finalized, the discussion in this section will focus on the structure of the New York/New Jersey acquisition agreement.

25/ See CSC Holdings, Inc., Securities and Exchange Commission Amendment No. 1 to Form S-3, filed June 30, 1998 at 6 ("Cablevision Form S-3/A") ("because holders of Class B Common Stock are entitled to ten votes per share while holders of Class A Common Stock are entitled to one vote per share, Dolan family members may control stockholder decisions on matters in which holders of Class A and Class B Common Stock vote together as a class").

26/ See CSC Parent Corporation, Securities and Exchange Commission Form S-4, filed January 20, 1998 at 25 ("Cablevision Form S-4").

members hold an additional 36.8 percent of the total voting power of all classes of the Common Stock.[27/]

TCI is further limited by a series of agreements it entered into as part of the transaction. First, on matters requiring a class vote, such as the election of the Class A directors and any increase in the number of authorized Class A shares, TCI must vote its shares in direct proportion to the votes of the non-TCI Class A shareholders.[28/] This structure effectively denies TCI any independent voting power, and prevents it from having any practical ability to sway the votes cast by the remainder of the company's stockholders on such matters. Second, TCI may not join a voting group or voting trust to aggregate its votes with any other shareholder and may not gain beneficial ownership of more than another ten percent of Class A shares.[29/] Third, while the transaction does allow TCI to designate up to two Class B seats on Cablevision's board of directors (which presently consists of fifteen seats), voting restrictions prevent it from appointing any additional directors.[30/] Since the Class B stockholders have the power to appoint 75 percent of the total Board, and because TCI can designate no more than two Class B directors, the Dolan family will always have the ability to appoint a majority of the board.

In short, since the Commission's attribution rules are designed to "focus primarily on those relationships which confer on their holders influence or control" over key business

---

27/ Cablevision Form S-3/A at 6

28/ Cablevision Form S-4 at 57-58. Presently, there are four Class A directors.

29/ Id. at 53.

30/ Id. at 7, 57. Consistent with the voting restrictions placed on its interests, TCI's must vote for the four directors appointed by the Class A shareholders in direct proportion to the votes of the non-TCI class A shareholders. See id.

decisions,[31] it would serve no purpose to deem TCI's interest in Cablevision to be attributable under the rules since that interest fails to provide TCI with any meaningful ability to exercise influence or control over Cablevision's key business decisions.

Notably, the Federal Trade Commission subjected the TCI/Cablevision transaction to rigorous review under the Hart-Scott-Rodino Act.[32] The FTC examined market power concerns raised by TCI's investment in Cablevision and the impact of the transaction on competition and diversity in the programming marketplace[33] – i.e., the very issues underlying the attribution and horizontal ownership rules. The agency found nothing in the structure of the transaction to cause it concern, imposing only one minor condition on its clearance of the transaction.[34]

C. The Cablevision/TCI Transaction Demonstrates the Wisdom of Adopting Flexible Attribution Rules That Permit Cable Operators to Enter Into Pro-Competitive Ventures and Alliances

The careful steps that Cablevision has taken to preserve control over its business operations demonstrate the wisdom of adopting flexible attribution rules that encourage, rather than deter, pro-competitive transactions. Given the rapid changes occurring in the cable and telecommunications businesses, the creation of new categories of attributable interests will

---

[31] Cable Attribution Notice at ¶ 13.

[32] Hart-Scott-Rodino Antitrust Improvement Act of 1976, Pub. L. 94-435, 90 Stat. 1390, codified at 15 U.S.C. § 15a. This section requires that any entity acquiring the stock or assets of another entity file a notification to the FTC or Department of Justice to enable the agencies to determine whether such an acquisition would violate federal antitrust laws, and provides an opportunity for the reviewing agency to block a merger it finds would be anticompetitive. Id. The section also requires the entity to undergo a waiting period of 30 days or as otherwise determined by the reviewing agency. Id.

[33] See Cablevision Form S-4 at 40. "Cablevision Gets FTC OK to Buy New York-Area Systems," Telecommunications Reports, January 19, 1998.

impede the efforts of Cablevision and other operators to attract the capital they need for continued growth and competitiveness.

To foster the growth and development of cable operators as full-fledged competitors in multiple markets, the Commission must avoid mechanical tests that establish a predetermined "attributable" equity or voting interest. If the Commission relies only upon mechanical, quantitative tests for determining attributable interests, it could discourage pro-competitive transactions that do not, as a practical matter, implicate the competition and diversity concerns sought to be addressed by the cable attribution rules. The Commission therefore should consider adopting a qualitative analysis for assessing whether an acquisition conveys an attributable interest in a company, as it does in cases where it must determine whether a party has acquired control over a licensee.[35/] At the same time, the Commission also should look to diminish the range of attributable interests rather than expand it.

At a minimum, the Commission should adopt its proposal to increase the voting stock benchmark for measuring an attributable to at least ten percent (10%) in all instances.[36/] Even where an investor exceeds this new, higher benchmark, the Commission's rules should not attach

---

[34/] As a condition of FTC clearance, Cablevision agreed to divest TCI systems serving approximately 5200 customers in two New Jersey communities, Paramus and Hillsdale, where both companies have operated their own separate cable systems.

[35/] The Commission has stated that its determination whether a party is in de facto control of a licensee or applicant "transcends formulas, for it involves an issue of fact which must be resolved by the special circumstanced presented." Univision Holdings, Inc., 7 FCC Rcd 6672, 6675 (1992), recon. denied, 8 FCC Rcd 3931 (1993), citing Stereo Broadcasters, Inc., 55 FCC 2d 819, 821 (1975). Case-by-case rulings are therefore required, and the Commission has considered a variety of factors in making its determinations, including equity holdings, board composition, and the investor's ability to control the management of corporate affairs. Univision Holdings, Inc., 7 FCC Rcd at 6675.

[36/] Cable Attribution Notice at ¶12.

an attributable interest unless the Commission concludes, after examining the facts of the investment on a case-by-case basis, that such interest enables the investor to wield a meaningful degree of control over the company.

The Commission should also consider creating a passive investor exemption to the attribution rules for minority shareholders that are precluded from exercising independent voting power. The determination of whether the minority shareholder qualifies for this exception also should be made on a case-by-case basis, but the Commission should presume that restrictions on the holder's ability to vote independently from the rest of the shareholders of the same class; enter into voting trusts, groups, or pools; and acquire additional shares in the future would trigger the application of the passive investor exemption. An investor should be able to qualify as "passive" even if it holds seats on the board of a cable company, if it is contractually limited to a small minority of seats.

Likewise, the Commission should build upon its single majority shareholder exception to the attribution rules, and create a controlling shareholder exception. Under this proposal, single shareholder interests short of outright majority control that nonetheless permit the holder to effectively exercise control over a cable company's strategic decisions and operations would act to preclude other shareholder interests from being deemed attributable under the Commission's rules.

D. The Commission Should Reform its Horizontal Ownership Rules to Ensure That They Do Not Preclude, Pro-Competitive Ventures Like the TCI-Cablevision Transaction

The Commission also should take this opportunity to reexamine and reform the combined effect of its cable attribution rules and horizontal ownership restrictions, in order to preclude those rules from operating to block pro-competitive transactions and alliances. Indeed, absent reform, the combined impact of the attribution and horizontal ownership rules could thwart Cablevision's ability both to grow and deliver the benefits of its clustering strategy to consumers.

For example, if TCI is deemed to hold an attributable interest in Cablevision, then not only would Cablevision's current subscriber base be counted against TCI for purposes of the horizontal ownership rules, but so too would any future systems acquired by TCI and/or AT&T. If AT&T/TCI eventually trigger or exceed the Commission's existing horizontal ownership ceiling, either through the expansion of their potential subscriber base in existing TCI systems or the acquisition of additional systems, then Cablevision's own ability to add systems to its three metropolitan clusters could be cut off. Under those circumstances, Cablevision's opportunities to expand would be limited by forces entirely outside its control – i.e., business decisions by AT&T/TCI. Ironically, such an outcome would effectively force Cablevision to surrender to TCI a far greater measure of control over Cablevision's future business operations than it actually conveyed to TCI in the transaction, since Cablevision's strategic decisions essentially would be leashed to – and dependent upon – the strategic decisions of AT&T/TCI.

Such an outcome is particularly counterproductive in light of the increasing size and access to capital of Cablevision's competitors. For example, the Commission approved the merger of Bell Atlantic and NYNEX and has encouraged the telephone companies to compete with Cablevision in the multichannel video programming market.[37/] The addition of GTE's substantial revenues and resources to Bell Atlantic/NYNEX makes Cablevision's primary

---

[37/] See, e.g., Reed Hundt, "The Hard Road Ahead – An Agenda for the FCC in 1997," (visited August 12, 1998) <http://www.fcc.gov/Speeches/Hundt/97agenda.txt> (noting FCC's objective of promoting a framework in which "cable companies and telephone companies will compete with each other in all geographic markets"); Hundt, Sept. 24, 1997 Testimony, supra n. 14.

competitor in the New York metropolitan area even more formidable.[38] Under these circumstances, the Commission should not now burden Cablevision by applying its attribution and horizontal rules in a manner that will stifle its efforts to raise the capital and achieve the scale it needs to compete effectively in the telephony, Internet access, and video markets where Bell Atlantic/NYNEX/GTE competes. Moreover, Cablevision will face additional competition from Bell Atlantic/NYNEX/GTE in its Boston franchises, and from SBC/Pacific/Ameritech/SNET in its Ohio and Connecticut markets. It must be able to respond to these entrenched incumbents through growth as well as other business strategies.

Given the cable industry's demonstrated commitment to providing local telephone service in competition with the incumbent local exchange carriers,[39] it is particularly inequitable for the Commission to impose regulatory limits on a cable company's potential customer base while no such restrictions are applicable to incumbent local exchange carriers (ILECs). Horizontal restrictions on cable are a regulatory anachronism that will impede local telephone competition by preventing cable companies from achieving the scale and scope necessary to act as facilities-based competitors to the ILECs.

Subjecting Cablevision, through TCI, to the constraints imposed by the horizontal ownership rules is also unnecessary because the TCI transaction was structured to alleviate concerns that it could reduce programming diversity or increase Cablevision or TCI's power in the programming market. As noted above, TCI's acquisition of an equity interest in Cablevision

---

[38] See Merger Enables Packaging, supra n. 19. See also "Access Drives Another Deal," Telephony, August 3, 1998 at 6 (noting that Bell Atlantic/GTE deal would create "a single company with a presence in 81 of the top 100 U.S. markets," that the "megacarrier would maintain 53 million access lines in 38 states" and "would be the largest cellular service provider and one of the largest Internet service providers").

does not affect Cablevision's control over its operations, including the selection of programming services for distribution on its systems.[40] TCI's indirect investment in Rainbow is likewise of no consequence, due to Cablevision's retention of control over operational matters.[41] As noted above, the transaction will actually enable Cablevision to increase programming diversity on its systems by facilitating the deployment of new regional programming services such as MSG Metro. Likewise, to the extent the transaction will stimulate and accelerate system upgrades by both Cablevision and TCI, it promotes additional channel capacity that permits even greater programming diversity in the future. The concerns about programming diversity that underlie the Commission's horizontal ownership rules are allayed, rather than exacerbated, by the Cablevision/TCI transaction.[42]

39/ See, e.g., Cox Rattles Baby Bell, supra n. 11.

40/ See supra Section II.B.

41/ Cablevision owns a 75% share of Rainbow Media, whose programming networks include AMC and Bravo. The remaining 25% share is owned by NBC Cable. Rainbow also owns a 60% interest in, and manages, Regional Programming Partners, a sports programming alliance forged via a separate transaction with Fox/Liberty Networks. In addition to MSG Network, Regional Programming Partners also owns interests in 7 other regional sports networks (RSNs), including Fox Sports New York and RSNs in New England, Chicago, Ohio, San Francisco and Florida.

42/ Cf. Horizontal Ownership Notice at ¶¶ 38-39 (noting that horizontal ownership limits are designed to prevent "a few large cable MSOs" from reducing programming diversity or exercising market power in the purchase of programming). Of course, since enactment of the 1992 Cable Act, the emergence of new competitors such as DBS and the telcos, as well as the significantly expanded channel capacity of cable systems nationwide, have helped to promote programming diversity by adding to the number of channels and distributors available to new programmers.

CONCLUSION

For the foregoing reasons, the Commission should revise its cable attribution rules in accordance with the analysis and proposals set forth herein. Specifically, the Commission should increase the voting stock benchmark in its cable attribution rules, create a passive investor exception, and revise its rules to ensure that pro-competitive transactions, such as the Cablevision/TCI deal, which are structured to preclude control by the investing entity, do not trigger application of the cable attribution rules.

Respectfully submitted,

CABLEVISION SYSTEMS CORPORATION

Howard J. Symons
Christopher J. Harvie
Mintz, Levin, Cohn, Ferris
Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
202/434/7300

Its Attorneys

Dated: August 14, 1998

DCDOCS: 132742.3 (2%f@03!.doc)